Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1610

RAMONA A. DROBENA, et al.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED STEEL WORKERS OF AMERICA, AFL-CIO, CLC, LOCAL 6178,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RAMONA A. DROBENA, et al.,
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NATIONAL LABOR RELATIONS BOARD AND UNITED STEEL WORKERS OF AMERICA, AFL-CIO, CLC, LOCAL 6178,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Ramona A. Drobena, Sally Boyd, Sharon Gentry, Deanna Ussery, and Dana Garner respectively pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 16, 1980.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and appears as Appendix A. The opinion of the National Labor Relations Board appears as Appendix B, and is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 16, 1980. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is the *per se* rule of the National Labor Relations Board, which completely immunizes labor unions from financial liability for violence which they wreak upon their employee victims, in accord with national labor policy?

STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of Sections 7, 8(b)(1)(A), and 10(c) of the National Labor Relations Act, 29 U.S.C. §§ 157, 158(b)(1)(A), and 160(c). The pertinent text of these Sections is set forth in Appendix C.

STATEMENT OF THE CASE

The petitioners, Ramona Drobena, Sally Boyd, Sharon Gentry, Deanna Ussery and Dana Garner (hereinafter Employees) have been employed by the National Rejectors Plant in Hot Springs, Arkansas (hereinafter Employer). At National Rejectors their exclusive bargaining representative has been the United Steelworkers, Local 6178 (hereinafter Union).

On January 15, 1978 and continuing through to March 19, 1978, the Union struck the Employer and established a picket line. Each of the petitioning Em-

ployees crossed the picket line and worked in the plant during some or all of the strike. Those who had not previously refused to become members of the union, resigned their union membership prior to crossing the union picket line.

Through its officers and members the Union launched a campaign of terror, abuse and harassment against these five Employees to punish them for exercising their statutory right to refrain from union membership and to refrain from participating in a strike. While some of these actions were taken prior to the end of the strike, the bulk of the action taken against the Employees followed the end of the strike when the union members had returned to work. These acts of abuse and terror by the Union culminated in the midnight shotgunning of the home of one petitioning Employee, Deanna Ussery, on April 20, 1978. Ultimately, the Employees could no longer continue their active employment at the National Rejectors Plant because of abuse, harrassment and intimidation.

In response to the foregoing activities by the Union the Employees filed unfair labor practice charges against the Union with Region 26 of the National Labor Relations Board.

The Regional Director of Region 26 found merit in the Employees' charges and issued an unfair labor practice complaint against the Union.

Later, the Regional Director and the Union settled the complaint by entering into a unilateral formal settlement stipulation.

The Employees declined to enter into that stipulation and filed a statement of objections with the

Regional Director and the General Counsel of the National Labor Relations Board solely because the settlement stipulation omitted a backpay remedy. Thereafter the General Counsel approved the formal settlement stipulation and forwarded it to the Board in Washington, D. C. for a final decision and order on the merits of the settlement agreement.

A panel of the Board in Washington, D. C. handed down an opinion, final decision and order which accepted the settlement agreement and denied backpay relief to the Employees. That decision has not been reported, but appears as Appendix B.

Within 60 days of the Board's final judgment and order, the Employees filed a timely Petition for Review with the United States Court of Appeals for the Eighth Circuit. The Board also filed a Petition for Enforcement of its Order, and that Petition along with the Employees' Petition for Review was consolidated for purposes of decision by the Court of Appeals.

On January 16, 1980 the Federal Court of Appeals entered a final decision and order denying the Employees' Petition for Review and granting the Petition for Enforcement. The written opinion of the Court which has not yet been published, is attached as Appendix A.

REASONS FOR GRANTING THE WRIT

I. Review should be granted to decide important questions affecting the proper administration of the National Labor Relations Act. The decision by the National Labor Relations Board, which was affirmed on appeal, perpetuates a *per se* rule which grants labor unions an absolute immunity against backpay awards when they have forced an employee to lose work through violence, intimidation and harassment. These questions have not been, but should be settled by this Court through the exercise of its supervisory powers.

This Petition focuses upon the present policy of the National Labor Relations Board with regard to union inspired violence. The Petitioners ask this Court to review the *per se* rule of the Board, which completely immunizes labor unions from financial liability for the violence which they wreak upon their employee victims. The Petitioners believe that such a *per se* rule is not in accord with national labor policy.

The Board has acknowledged that one of the fundamental purposes of the National Labor Relations Act is to resolve industrial strife through peaceful means and protect § 7 (29 U.S.C. § 157) rights of employees. *Clear Haven Nursing Home,* 236 NLRB No. 102, (1978). It has also acknowledged that physical abuse is misconduct which the National Labor Relations Act was clearly designed to discourage and remedy in full. *Graves Trucking, Inc.,* 246 NLRB No. 52 (1979). Yet, for more than thirty years, starting with *Colonial Hardwood,* 84 NLRB 563 (1949), the Board has engaged in the unequal administration of the Act by remedying employer violence in full, but denying the same rights to employees who are the hapless victims of union violence.

How has the Board done this? It has been accomplished through the manipulation of the backpay remedy. The Board has adopted a *per se* rule in which the

employee who is the victim of abuse and violence by his union alone, finds that the loss of pay, which results from the union's unlawful conduct, is fully borne by him. On the other hand, the employee who has the dubious good fortune of being victimized by his employer, is fully compensated for his injuries.

Such a situation clearly contravenes the even-handed approach of the National Labor Relations Act, particularly in the context of an injury inflicted by the very union which owes the employee a duty of complete fidelity. The protection, and not the destruction, of the rights of employees is the *raison d'etre* for unionism.

Nevertheless, the Board has adopted a policy whose fundamental effect is to leave financially uncompensated the victim of union violence. Such a policy, the Petitioners believe, unwittingly encourages union violence against employees. Such encouragement derives from the fact that violence-prone unions know they will not be liable financially to their victims. The Board may (as it has in this case) order the union not to engage in further acts of violence, but nothing is done for the present except to force a promise from the union to behave in the future. Such an approach to the formulation and administration of National Labor policy is akin to the common law tort concept of "one free bite" for domestic animals. Moreover, the union promise to behave in the future is academic for the employee, as in the instant case, is no longer employed, and the employer is under no obligation to rehire him.

On the other hand, employers who commit acts of violence against their employees are granted no such immunity and are required to compensate financially the injured employee. A classic example of this uneven administration of the National Labor Relations Act is the contrast between the instant case and another decided just a few months ago by the Board.

The case is *Graves Trucking, Inc.*, 246 NLRB No. 52 (1979). In the facts of that case one of the employee's supervisors became annoyed by the employee's exercise of protected rights and violently grabbed him by the neck and choked him. The employee suffered resulting injuries to his neck and some pain. This choking incident caused him to be unable to return to work.

In the Board's review of the decision of the administrative law judge, the Board noted that the injured employee had not been fired, and therefore a reinstatement order was not warranted.[1] Nevertheless, the Board found that the injured employee should be awarded backpay for the period of the disabling injury in order to make him whole for the losses resulting from his employer's unlawful conduct.

The employer, defending against his backpay liability in a case in which the employee had not been discharged, raised precisely the same arguments that the Board presently uses to justify its policy at issue in this Petition.[2] The employer asserted that a back

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[1] The Board formerly justified its *per se* rule insulating unions from back pay liability upon it reading of 29 U.S.C. § 160(c) which arguably links the back pay remedy to reinstatement. In the Petitioners' brief before the Court below, they argued that this statutory approach was meritless and the Board conceded that its present rule is based on policy alone.

[2] The only distinction not raised in *Graves* and other employer-employee victim cases, is the protection afforded to the union's right to strike. One of the props the Board raises in support of its *per se* rule is that unions would be dissuaded from striking if they would be liable for backpay to their victims.

That plea, in the context of this case, highlights the inequities of this *per se* rule. The record is absolutely undisputed that the employees asked for not one penny of back pay during the time that the Union was on strike. It was not until after the union members and officers had returned to work that the employees suffered the bulk of the harassment and intimidation.

pay award was improper for physical injuries suffered by the employee. Such reparation should properly be sought in other available forums, he reasoned.

The Board rejected the employer's argument and stated:

> Contrary to Respondent's suggestion, such a monetary award is not reparation for the physical injury suffered by Nash [the injured employee], but a necessary remedy to vindicate the purposes of the Act. The only way to restore Nash as nearly as possible to the economic position he would have obtained, but for Respondent's unlawful conduct, is to make him whole for compensation lost as a result of Respondent's unfair labor practice . . . Were we to withhold backpay in these circumstances we would allow Respondent to escape all liability for the loss of wages Nash suffered because of factors Respondent unlawfully caused. Such a result would clearly be contrary to the remedial policies of the Act.

Slip Opinion at p. 5. (footnotes omitted).

Must the basic remedial policies of the Act vary depending upon who is the perpetrator of the violence? They must if the Board's policy toward the Petitioners is to be upheld. But just as surely it is clear that the basic remedial policies of the Act protect an employee who is the victim of unbridled lawlessness regardless of whether the perpetrator wears the label "management" or "union". The rights of employees who oppose the union are just as secure as the rights of employees who support the union. *See NLRB* v. *Magnavox,* 415 U.S. 322, 326 (1974). When the Board closes its eyes to the rights of victims of union violence, it abuses its mandate to justly administer the national labor law.

The primary purpose of the Act is to protect *employee* rights, not unions as institutions, *Mosher Steel Co.* v. *NLRB,* 568 F.2d 436, 442 (5th Cir. 1978); *Templeton* v. *Dixie Color Printing Co.,* 444 F.2d 1064, 1070 (5th Cir. 1971). To require an employee to bear the onerous burden of the union's wrongdoing skewers the employees' Section 7 rights, the heart of the Act. The Petitioners urge this Court to address and correct the Board's policy of insulating unions from financial liability for violence and intimidation against the employees they represent.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 14, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1366

RAMONA A. DROBENA, SALLY BOYD, SHARON GENTRY, DEANNA USSERY and DANA GARNER, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, LOCAL 6178, *Intervenor-Respondent.*

No. 79-1501

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, LOCAL 6178, *Respondent.*

Petition for Review of Order of National Labor Relations Board

Application for Enforcement of Order of National Labor Relations Board Upon Stipulation of the Parties for Consent Judgment.

Submitted: November 7, 1979

Filed: January 16, 1980

Before GIBSON, Chief Judge,* and STEPHENSON and HENLEY, Circuit Judges.

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* The Honorable Floyd R. Gibson was Chief Judge of the Eighth Circuit at the time this case was submitted, and took senior status on December 31, 1979, before the opinion was filed.

HENLEY, Circuit Judge.

These two original proceedings, which have been consolidated and submitted together, involve the validity of a consent cease and desist order entered by the National Labor Relations Board and directed at Local 6178 of the United Steelworkers of America, AFL-CIO, CLC (Union) on account of certain unfair labor practices committed by officers and members of the Union at the manufacturing plant operated by National Rejectors, Inc. in Garland County, Arkansas. The parties stipulated that the Union had violated the provisions of § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A),[1] and the order was entered as provided by § 10(c) of the Act, 29 U.S.C. § 160(c). The order directed that the Union cease and desist from the practices in question and post notices of compliance. The order did not require the union to pay back wages to individual employees who had lost work on account of the unlawful practices of the Union.[2]

The order in question was the result of negotiations between the Union and the Regional Director of the Board. Five female employees of National Rejectors objected to the failure of the settlement agreement to provide them with back pay on account of time lost due to the unfair labor practices of the Union.[3] However, the settlement was

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[1] That section makes it an unfair labor practice for a labor union to restrain or coerce employees in the exercise of rights guaranteed by § 7 of the Act, including the right to refrain, subject to certain limitations, from participating in certain union sponsored activities. 29 U.S.C. § 157.

[2] As will be seen, certain employees of the Garland County plant at National Rejectors undertook to continue work in spite of a picket line that the Union had established at the plant in 1978; their efforts were interfered with and frustrated by the activities of Union officers and members, and the employees involved lost time from their work.

[3] *See* n.2 *supra*.

eventually approved by the Board. The agreement stipulated that the Board might apply to this court for enforcement of the agreed order, and that an order of enforcement would be entered without any contest on the part of the Union.

In due course the Board applied to this court for enforcement of the order (No. 75-1501), and the five female employees who have been mentioned filed a petition for a review of the Board's order contending solely that the order should have made a back pay award in their favor (No. 79-1366). In No. 79-1366 the Union has been permitted to intervene as a respondent.

There is no dispute about the facts of the controversy, and the question presented in these proceedings is an extremely narrow one. The question is as to the validity of a long-standing Board policy not to make a back pay award under § 10(c) of the Act[4] in cases in which employees have lost work as the result of the direct impact on them of unlawful union activity without their employer being a participant in the unlawful activity or the conduit through which the unlawful union activity moved to affect the employees in question.

The parties are in agreement that the Board policy here challenged was first announced in 1949 in *Colonial Hardwood Flooring Co.* v. *N.L.R.B.*, 84 N.L.R.B. 563 (1949).

For a good many years that policy was based on the idea that under the wording of § 10(c) the Board had no power to order a union to pay back wages in a case in which the employer had not been directly or indirectly involved in

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[4] Insofar as here pertinent, § 10(c) provides that if the Board finds that an employer or a labor union has been guilty of an unfair labor practice it is to issue a cease and desist order which may require reinstatement of displaced employees with or without back pay; under the section both an employer and a union are subject to being required to pay back wages to aggrieved employees.

the unlawful activity of the union. *See Progressive Mine Workers of America,* v. *N.L.R.B.,* 187 F.2d 298, 307 (7th Cir. 1951). However, we are told that in more recent years the Board has justified its position not by reference to any lack of power but simply to policy considerations that will be mentioned in due course. *See Union de Tronquistas de Puerto Rico ("Lock Joint Pipe"),* 202 N.L.R.B. 399 (1973). And that is the approach that the Board has taken in this litigation.

Turning to the facts, National Rejectors is engaged in Arkansas in the business of manufacturing and selling coin and currency changing devices. It is unquestionably an employer that is covered by the Act, and the Act is applicable to its employees and to labor unions that may have become or seek to become collective bargaining agents for employees. For a number of years certain classifications of employees of National Rejectors have been represented for bargaining purposes by the intervening Union, and petitioners may have been members of the Union. Previous labor troubles between National Rejectors and the Union led to the opinion of this court in *National Rejectors Indus.* v. *United Steelworkers of America,* 562 F.2d 1069 (8th Cir. 1977).

In 1978 the Union established a picket line at National Rejectors' Garland County plant. Petitioners and other employees did not desire to honor the line and undertook to continue work. They were met by threats, harassment, some violence and a substantial amount of property damage.[5]

In due course, petitioners filed an unfair labor practice charge with respect to which the Board assumed jurisdic-

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[5] The record does not establish the full extent to which the individual petitioners in the case actually sustained harm on account of the Union's misconduct. As indicated, the controversy between the Board and the Union was settled; no hearing was held, and no factual findings, beyond those agreed to, were made by the agency.

tion, and a complaint against the Union was issued charging violations of § 8(b)(1)(A).[6] As has been seen, the matter was compromised and, over the objection of petitioners, a cease and desist order that did not include a back pay award was entered.

The parties agree broadly that the Board has wide discretion in approving amicable settlements of disputes between itself, on the one hand, and employers or labor unions, on the other hand, and that settlements approved by the Board need not necessarily satisfy all of the demands of every "charging party."

The parties also agree that while back pay awards are authorized by § 10(c), such awards are not mandatory, mechanical or automatic and that the making or withholding of such awards rests within the sound discretion of the Board, subject to limited judicial review. *N.L.R.B.* v. *Strong*, 393 U.S. 357, 358-59 (1969); *Nathanson* v. *N.L.R.B.*, 344 U.S. 25, 29-30 (1952); *Virginia Elec. & Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 198 (1941); *N.L.R.B.* v. *J. S. Alberici Construction Co.*, 591 F.2d 463, 468 (8th Cir. 1979); *Hanley Transfer Co.* v. *N.L.R.B.*, 390 F.2d 777, 782 (8th Cir. 1968).

And, petitioners also concede that the Board's policy that has been mentioned ruled out any back pay awards in their favor. Petitioners' quarrel is with the policy itself, and they also contend that the application of the policy to this case amounted to an abuse of administrative discretion.

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[6] The charge was prepared and filed on behalf of petitioners by the legal staff of the National Right to Work Legal Defense Foundation of Fairfax, Virginia, and counsel for the Foundation represent petitioners in connection with the instant proceedings. Petitioners are also represented here by capable Arkansas counsel. The Board is represented by its own attorneys, and the Union is represented by a well known Arkansas law firm that specializes in labor litigation.

That the policy in question facilitates settlements in cases in which unions have been charged with wrongdoing is a proposition that cannot seriously be denied since, obviously, a union will be more likely to agree to a cease and desist order that does not involve payments of back wages to be made by the union than it will be to agree to an order, compliance with which will require it to make back wage payments that may be quite substantial.

Other considerations urged upon us by counsel for the Board and the Union are that back pay awards in cases of this kind may deter union members from exercising their constitutionally protected right to strike and related rights, that such an award may bring about the financial ruin of a local union resulting from the irresponsible acts of one or a few members surcharged with the emotions that labor strife can produce, that computation and enforcement of such awards would unduly tax the facilities of the Board, and that in any event injured employees can find adequate redress by means of conventional judicial remedies outside the framework of the Act. Petitioners strongly urge countervailing considerations.

Counsel for petitioners concede that the Board's policy has been adhered to tenaciously for some thirty years. It has won some but not much judicial support. *N.L.R.B.* v. *Oil, Chemical & Atomic Workers International Union,* 476 F.2d 1031, 1037 (1st Cir. 1973); *Progressive Mine Workers of America* v. *N.L.R.B., supra.*[7]

It is not too much to say that the members of this panel of this court do not think highly of the Board's policy that

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[7] The Board has also cited us to the recent decision of the Supreme Court in *International Brotherhood of Electrical Workers* v. *Foust,* —— U.S. ——, 99 S.Ct. 2121 (1979), wherein it was held to be contrary to national labor policy to subject a labor union to punitive damages for a willful breach of its duty of fair representation. We point out, however, that an award of back pay under the N.L.R.A. is not a "punitive" award.

has been described as that policy applies to the alleged facts of this case. However, it is not the function of the court to make Board policy. The policy in question is one of long standing, and we decline to disturb it. Nor, granting the validity of the policy, do we see any abuse of agency discretion in the application of the policy to this case.

The petition for review in No. 79-1366 is denied. The Board's petition for enforcement in No. 79-1501 is granted.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

DS-1172
Hot Springs, Ark.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 26-CB-1362

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
LOCAL 6178
(National Rejectors, Inc.)

and

RAMONA A. DROBENA, SALLY BOYD, SHARON GENTRY,
DEANNA USSERY AND DANA GARNER, *Individuals*

DECISION AND ORDER

Statement of the Case

On October 10, 1978, United Steelworkers of America, AFL-CIO, CLC, Local 6178, herein called the Respondent; and the General Counsel of the National Labor Relations Board entered into a Stipulation, in settlement of the case, subject to the approval of the Board, providing for the entry of a consent order by the Board and a consent judgment by any appropriate United States Court of Appeals. The parties waived all further and other procedure before the Board to which they may be entitled under the National Labor Relations Act, as amended, and the Rules and Regulations of the Board, and Respondent waived its right to contest the entry of a consent judgment or to receive further notice of the application therefor.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The aforesaid Stipulation is hereby approved and made a part of the record herein, and the proceeding is hereby transferred to and continued before the Board in Washington, D.C., for the entry of a Decision and Order pursuant to the provisions of the said Stipulation.[1]

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[1] Ramona A. Drobena, Sally Boyd, Sharon Gentry, Deanna Ussery and Dana Garner, the individual Charging Parties, have refused to execute the Stipulation because it does not provide them with a backpay remedy for the Section 8(b)(1)(A) violations of the Respondent, United Steelworkers of America, AFL-CIO, CLC, Local 6178. Through their counsel, they argued to the Regional Director in their objections that the doctrine established by the Board in *Colonial Hardware Flooring Company, Inc.*, 84 NLRB 563, should be overruled or distinguished herein because the Board has power to grant such a backpay remedy under Section 10(c) of the Act and the stated policy reasons for denying backpay relief herein are unwarranted in law and unjustified in fact. After considering the Charging Parties' objections, the Regional Director forwarded the Stipulation to the General Counsel with a recommendation for approval.

By letter dated November 2, 1978, the General Counsel advised counsel for the Charging Parties that he had considered carefully the Stipulation and the objections and found no basis for not approving it. He pointed out that, contrary to the contention that the Stipulation is defective because it does not provide for a backpay remedy, well-established Board precedent precludes such backpay remedy citing *Catalytic Industrial Maintenance Co., Inc.*, 219 NLRB 414, *Lock Joint Pipe*, 202 NLRB 399, and *Long Construction Company*, 145 NLRB 544. He also noted that the remedy provided by the Stipulation is that which the Board has developed as appropriate for the kind of violations involved. Accordingly, the General Counsel advised the Charging Parties that, as the Stipulation covered all the violations alleged, he was submitting it to the Board with a recommendation for approval and that they could submit to the Board a statement in support of their objections.

On November 13, 1978, the Charging Parties filed a Supplementary Statement of Objections to Formal Stipulation in which it not only reiterated its earlier objections but also adverted to the Board's recent decision in *Clear Haven Nursing Home*, 236 NLRB No. 102, in which the Board majority refused to approve a settlement stipulation because there was no provision for a backpay

Upon the basis of the aforesaid Stipulation and the entire record in the proceeding, the Board makes the following:

Findings of Fact

1. *The business of the Employer*

National Rejectors, Inc., the Employer, is now, and has been at all times material herein, a corporation doing business in the State of Arkansas, with an office and place of business located in Hot Springs, Arkansas, where it is engaged in the manufacture of metal products.

During the past 12 months, National Rejectors, Inc., in the course and conduct of its business operations, pur-

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remedy. They argue that they should not be denied backpay solely because they were "victimized by their union rather than their employer." Contrary to the Charging Parties, we believe that the policy considerations set forth in the three Board precedents cited above which justify the refusal to award such a backpay remedy herein continue to be valid and therefore are reaffirmed. (See also *N.L.R.B.* v. *Oil, Chemical and Atomic Workers, International Union, AFL-CIO, et al.*, 476 F.2d 1031, where the First Circuit affirmed this policy.) Further, we find clearly distinguishable the *Clear Haven* precedent which involved an unlawful refusal to reinstate strikers who had unconditionally offered to return to work and who, under the proposed non-Board settlement, were to be reinstated. Under Section 10(c) of the Act, the Board is specifically authorized to require backpay where reinstatement is directed. Further, in rejecting the non-Board settlement, the Board majority relied upon other defects, such as the absence of an effective notice to employees. Finally, it is to be noted that the dissenters in *Clear Haven* were willing to approve the stipulation even though it did not provide for a backpay remedy.

Accordingly, after carefully reviewing the stipulation and the Charging parties' objections and supplementary statement of objections and considering our reaffirmance of the validity of the policy underlying established Board precedents in this area and in view of the recommendations of the Regional Director and General Counsel, we have decided that the objections lack merit and that it would effectuate the policies of the Act to approve, and we do approve, the Stipulation.

chased and received at its Hot Springs, Arkansas, location, products valued in excess of $50,000 directly from points located outside the State of Arkansas, and, during the same period of time, National Rejectors, Inc., sold and shipped from its Hot Springs, Arkansas, location, products valued in excess of $50,000 directly to points located outside the State of Arkansas.

The Respondent admits, and we find, that National Rejectors, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. *The labor organization involved*

United Steelworkers of America, AFL-CIO, CLC, Local 6178, is a labor organization within the meaning of Section 2(5) of the Act.

ORDER

Upon the basis of the above findings of fact, the Stipulation, and the entire record in the proceedings, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

The Respondent, United Steelworkers of America, AFL-CIO, CLC, Local 6178, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Threatening to inflict bodily harm to employees and families of employees of National Rejectors, Inc.

(b) Physically assaulting, striking or inflicting bodily harm upon employees of National Rejectors, Inc.

(c) Threatening to damage, damaging or attempting to damage the vehicles or property of employees of National Rejectors, Inc., by placing sugar in the gasoline tank

of an employee's vehicle, by applying paint to an employee's vehicle, by slashing tires of an employee's vehicle, by breaking the windows of an employee's vehicle, or by striking an employee's vehicle with a tire tool, or by hitting or striking said vehicle or property in any manner.

(d) Following employees after they leave National Rejectors, Inc.'s Hot Springs, Arkansas, facility.

(e) Threatening to harm or otherwise engage in reprisals against employees of National Rejectors, Inc.

(f) In any other manner restraining or coercing employees of National Rejectors, Inc., in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which the National Labor Relations Board finds will effectuate the policies of the National Labor Relations Act, as amended.

(a) Post at its business office in Benton, Arkansas, copies of the attached Notice to Employees and Members. Copies of said Notice, on forms provided by the Regional Director for Region 26, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 26 signed copies of the said Notice for posting, if National Rejectors, Inc., is willing, in the plant of National Rejectors, Inc., at Hot Springs, Arkansas, in the places where notices to employees are customarily posted. Copies of said Notice, on forms provided by the Regional Director for Region 26, after having been signed by Respondent's representative,

shall be forthwith returned to the Regional Director for such posting by National Rejectors, Inc.

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., March 14, 1979.

John H. Fanning, Chairman
Betty Southard Murphy, Member
John C. Truesdale, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

BASED UPON A STIPULATION PROVIDING FOR A CONSENT JUDGMENT OF ANY APPROPRIATE UNITED STATES COURT OF APPEALS, AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT threaten to inflict bodily harm to employees and their families, of National Rejectors, Inc.

WE WILL NOT physically assault nor inflict bodily harm to employees of National Rejectors, Inc.

WE WILL NOT threaten to damage, attempt to damage nor damage the vehicles or property of employees of National Rejectors, Inc.

WE WILL NOT follow employees after they leave the facility of National Rejectors, Inc.

WE WILL NOT threaten to harm or otherwise engage in reprisals against employees of National Rejectors, Inc.

WE WILL NOT in any other manner restrain or coerce employees of National Rejectors, Inc. in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC, LOCAL 6178
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Suite 800, Mid-Memphis Tower Building, 1407 Union Avenue, P.O. Box 40085, Crosstown Station, Memphis, Tennessee 38104, Telephone 901/521-2725.

APPENDIX C

29 U.S.C. § 157

SECTION 7

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158

SECTION 8(b)(1)(A)

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein:

29 U.S.C. § 160(c)

SECTION 160(c)

The testimony taken by such member, agent, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall is-

sue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of Section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

No. 79-1610

Supreme Court, U. S.
FILED
JUN 5 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

RAMONA A. DROBENA, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEEL WORKERS OF AMERICA,
AFL-CIO, CLC, LOCAL 6178

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 612 F. 2d 1095. The decision and order of the National Labor Relations Board (Pet. App. 9a-16a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1980. The petition for a writ of certiorari was filed on April 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board exceeded its remedial authority in approving a settlement agreement which did not contain, as a remedy for the Union's unlawful action in physically coercing employees who went to work during a strike, a provision compensating the employees for lost pay for work that they missed as a result of the Union's action.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, are set forth at Pet. App. 17a-18a.

STATEMENT

1. In the Spring of 1978, petitioners, five employees of National Rejectors, Inc., filed charges with the National Labor Relations Board alleging that the United Steel Workers of America, AFL-CIO, CLC, Local 6178, the exclusive bargaining representative for the employees at National Rejectors, had violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by interfering with petitioners' rights to "(a) refrain from union membership [and] (b) refrain from engaging in concerted strike activities" (A. 4-6).[1] The Board's Regional Director subsequently issued a complaint alleging that the Union had violated Section 8(b)(1)(A) by reason of three of its officers and several of its members having made threats of violence and having engaged in acts of violence directed against some of the petitioners in retaliation for their having crossed the Union's picket line during a strike against National Rejectors (A. 8-11). In September 1978, the Regional Director entered into a stipulation in settlement of the case, in which the Union

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[1]References to "A." are to the printed appendix filed in the court of appeals.

agreed to cease and desist from the conduct alleged and to post appropriate notices, and consented to the entry of a Board order to that effect and to judicial enforcement of the order (A. 12-18).

Petitioners objected to the proposed settlement only to the extent that it "omit[ted] backpay relief" (A. 20). Their objection was rejected by both the Regional Director and the General Counsel (A. 18-19, 20-31, 32-36). The General Counsel then submitted the settlement agreement to the Board for approval, noting that "it is well settled that Board precedent precludes [a backpay] remedy" (A. 18).

2. The Board approved the settlement over petitioner's objection. In so doing, the Board reaffirmed the policy considerations set forth in *Catalytic Industrial Maintenance Co.*, 219 N.L.R.B. 414 (1975), *Lock Joint Pipe & Co.*, 202 N.L.R.B. 399 (1973), and *Long Construction Co.*, 145 N.L.R.B. 554 (1963), in which the Board had declined to award backpay remedies in situations similar to the instant case (Pet. App. 10a-11a n.1).[2]

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[2]As the Board explained in *Lock Joint Pipe & Co., supra*, 202 N.L.R.B. at 399-400 (footnotes omitted):

> The extension of backpay liability to a situation where, as here, only picket line misconduct has occurred involves important considerations going to the heart of the right to strike under Sections 7 and 13 of the Act. Those sections of the Act have been called the safety valves of labor management relations. Emotions run high among those for and those against the union. Regrettable [*sic*], sometimes there is violence and the threat of violence. This we deplore and in no way condone. However, adequate remedies under the Act other than backpay exist to prevent the occurrence of violence without interfering with the right to strike. Where union agents, including pickets, engage in conduct violative of Section 8(b)(1)(A), the Board enjoins the continuation of such conduct and may, if warranted, seek an immediate court injunction under Section 10(j) of the Act. If

3. Petitioners sought review in the court of appeals. The court enforced the Board's order (Pet. App. 1a-7a), observing that the parties agreed "that the Board has wide discretion in approving amicable settlements * * * and that settlements approved by the Board need not necessarily satisfy all the demands of every 'charging party' [and, further,] that the making or withholding of [backpay] awards rests within the sound discretion of the Board, subject to limited judicial review" (Pet. App. 5a). The court of appeals concluded "it is not the function of

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such judicially directed injunctive relief is ignored, effective contempt action is available. Finally, when a union resorts to or encourages the use of violent tactics to enforce its representation rights the Board may decline to issue a bargaining order to remedy an employer's unfair labor practices and instead may direct an election to determine whether or not the union is the recognized representative.

To do more, in our opinion, runs the risk of inhibiting the right of employees to strike to such an extent as to substantially diminish that right. For the misconduct of a few pickets may be sufficient to find the union in violation of Section 8(b)(1)(A) and enough to intimidate many employees. The Board would then be required * * * to seek backpay for all intimidated employees. Faced with this financial responsibility, few unions would be in a position to establish a picket line.

Cf. International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42, 48-52 (1979).

In *Long Construction Co., supra*, the Board added that the lack of a Board order awarding backpay to employees unable to work because of injuries resulting from a union's unlawful conduct will not leave such employees without redress against those responsible for their injuries. Such individuals will still have available those private remedies traditionally used to process claims resulting from another's tortious conduct. See *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958). In fact, they may be better served by pursuing such remedies, since an employee's pay may be only a small part of the total amount required to make him whole, which may include medical expenses and compensation for physical injury and for pain and suffering (*id.* at 645-646).

the court to make Board policy. The policy in question is one of long standing, and we decline to disturb it. Nor, granting the validity of the policy, do we see any abuse of agency discretion in the application of the policy to this case" (Pet. App. 7a).

ARGUMENT

Section 10(c) of the Act, 29 U.S.C. 160(c), endows the Board with broad discretion to establish appropriate remedies. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). A remedial order "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964), quoting *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943), for "[t]he particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.' " *Virginia Electric & Power Co.* v. *NLRB*, *supra*, 319 U.S. at 539, quoting *I.A. of M.* v. *NLRB*, 311 U.S. 72, 82 (1940); *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 600 (1941). This broad discretion extends to "[t]he remedy of back pay [, which] is entrusted to the Board's discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198 (1941).

Similarly, the Board has broad discretion to approve settlements despite the objections of a concerned party. Settlements enable the Board to put a quick end to misconduct by subjecting violators to civil and criminal contempt penalties and to avoid protracted and often unpredictable litigation. Moreover, settlements, like remedial orders entered after litigated proceedings, are designed to effectuate public, not private, interests. The Act creates no private rights, but rather authorizes the

Board to impose remedies in the public interest to effectuate the purposes of the Act. See *Amalgamated Utility Workers (C.I.O.)* v. *Consolidated Edison Co. of New York*, 309 U.S. 261, 269-270 (1940); *NLRB* v. *Martin A. Gleason, Inc.*, 534 F. 2d 466, 482-483 (2d Cir. 1976); *Oshkosh Truck Corp.* v. *NLRB*, 530 F. 2d 744, 748 (7th Cir. 1976), and cases cited therein.

The court below correctly concluded that, under the foregoing principles, it was an allowable exercise of the Board's authority under the Act to accept a settlement which did not compenate the employees for lost pay for work that they missed as a result of the Union's strike misconduct. The court's decision is in accord with those of other courts of appeals that have considered the question. See *NLRB* v. *Martin A. Gleason, Inc., supra; NLRB* v. *Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO*, 476 F. 2d 1031, 1037 (1st Cir. 1973).[3] Moreover, the Board's policy of not awarding backpay to employees who are absent from work because of union unfair labor practices that do not cause unlawful employer discrimination has been in effect for more than thirty years and Congress, although it has twice amended the Act during that time, has not seen fit to change that policy. See *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951). In these circumstances, no issue warranting review by this Court is presented.[4]

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[3]In *Progressive Mine Workers* v. *NLRB*, 187 F. 2d 298, 307 (1951), the Seventh Circuit agreed with the Board's position in *Colonial Hardwood Flooring Co.*, 84 N.L.R.B. 563 (1949), that it lacked statutory authority under Section 10(c) to grant backpay in the situation here. Presently, the Board bases its policy not on any statutory prohibition, but rather on policy considerations (see cases cited at page 3, *supra*).

[4]Petitioners' reliance (Pet. 7-8) on *Graves Trucking, Inc.*, 246 N.L.R.B. No. 52 (Nov. 2, 1979), is misplaced. In that case, the Board

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1980

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ordered the employer to pay lost wages to an employee who was incapacitated from working as a result of a physical attack by his supervisor precipitated by the employee's challenge, on behalf of himself and his fellow employees, to a change in working conditions. However, as petitioners recognize (Pet. 7 n.2), an award of backpay in that case was not likely to chill the fundamental right to strike. By contrast, a backpay award in the situation here would present that danger (see note 2, *supra*). Nor can the instant case be viewed as involving only post-strike retribution directed at non-participating employees. The incidents of violence began during the strike and spilled over into the immediate post-strike period (see Pet. App. 2a n.2).

DOJ-1980-06